COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3358-CR **Cir. Ct. No. 02-CT-437**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN M. KLOTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Kevin M. Klotz appeals from a conviction for one count of operating a motor vehicle while under the influence of an intoxicant, second offense (OMVWI), contrary to WIS. STAT. §§ 346.63(1)(a) and

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

346.65(2)(b). Klotz asserts that the results of his blood alcohol concentration test must be suppressed because he lost all incentive to seek an alternate test after the arresting officer informed him that his test results were twice the legal limit. We conclude that we need not reach this issue because Klotz's conviction for OMVWI is adequately supported by the record, and he has not argued that without the evidence of his blood alcohol concentration, the remaining evidence was insufficient to support this conviction. Accordingly, we affirm.

¶2 The following facts are taken from the criminal complaint filed against Klotz. City of Oshkosh Police Officer Timothy Skelton observed a car make a turn in what he described as a "burn out type fashion." The car accelerated quickly with the tires squealing, the rear end fishtailed over both northbound lanes of traffic and then the car crossed into the southbound lanes. The driver overcorrected in an attempt to get into the northbound lanes and the car again fishtailed. Skelton stopped the vehicle and when he approached the driver, he immediately smelled "an extremely strong odor of intoxicants coming from the vehicle." He identified the driver as Klotz and observed that his eyes were "bloodshot and glazed over" and his speech was so slurred that it was almost impossible to understand what Klotz was saying. Skelton requested that Klotz exit the vehicle, but when he opened the door, he fell back into the car and the officer had to assist Klotz to exit the car. After failing one field sobriety test, Klotz stated that there was no point in performing additional tests and the officer should just "take him."

¶3 Klotz was transported to the Winnebago County Safety Building and taken to the Intoxilyzer room. Skelton read the Informing the Accused form to Klotz verbatim. Klotz voluntarily submitted to a breath test. The test result was a blood alcohol concentration of 0.23%, and Skelton told Klotz that he was over

twice the legal limit. Subsequently, a criminal complaint was issued charging Klotz with second offense OMVWI and operating a motor vehicle with a prohibited blood alcohol concentration (OMVPBAC).

¶4 Klotz brought a motion to suppress the Intoxilyzer results because of his claim that the arresting officer violated his statutory right to an alternate blood alcohol test. He asserted in the circuit court that when he was informed that in the opinion of the officer he had a high test result, he lost all incentive to seek an alternate test and this amounted to a violation of his statutory right. The circuit court denied the motion, concluding that this was not a violation of Klotz's statutory right. Klotz then entered a no contest plea to the second offense OMVWI charge. The circuit court accepted the plea and entered a judgment of conviction.

¶5 On appeal, Klotz renews his argument. He argues that a series of decisions from the appellate courts of this state establishes his right to an alternate test as a due process right that the courts are required to strictly protect.[2] Applying this proposition to the undisputed facts of this case, Klotz claims that Skelton's comments that his test results were twice the legal limit interfered with his ability to make an informed choice about whether to submit to an alternate test. He suggests, "[a]fter all, what incentive does an individual have to request an alternate test if a person in authority, with demonstrated knowledge and experience in this area, tells the person the result is more than double the legal limit."

[2] Klotz relies upon ***State v. Walstad***, 119 Wis. 2d 483, 351 N.W.2d 469 (1984); ***State v. Ehlen***, 119 Wis. 2d 451, 351 N.W.2d 503 (1984); ***State v. Disch***, 119 Wis. 2d 461, 351 N.W.2d 492 (1984); ***State v. Renard***, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985); and ***State v. McCrossen***, 129 Wis. 2d 277, 385 N.W.2d 161 (1986).

¶6 But we need not consider whether the circuit court should have suppressed the results of Klotz's blood alcohol concentration test because Klotz was convicted of OMVWI. Even if the blood alcohol concentration test results are suppressed, the OMVWI conviction remains. Although Klotz's blood alcohol content as revealed by the blood alcohol test is relevant to determine whether he is guilty of OMVWI, he has not argued that the absence of evidence of his blood alcohol content makes the total remaining evidence insufficient to support a conviction for OMVWI. We generally do not decide issues not raised on appeal. ***State v. Elmer J.K.***, 224 Wis. 2d 372, 381 n.4, 386, 591 N.W.2d 176 (Ct. App. 1999). We, therefore, do not address this issue.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.